Supreme Court of the United States

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 695

ABRAHAM CHAIFETZ, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR REHEARING

Abraham Chaifetz, the petitioner, a member of the bar of this Court seeks a rehearing of that part of his petition for a writ of certiorari which denied the petition insofar as Count III of the indictment was concerned.

The jury acquitted Petitioner of Counts I, II, and V, and this Court by its order of May 1, 1961 granted certiorari and reversed the conviction on Count IV, thus leaving Count III as the sole remaining count on which Petitioner stands convicted.

The Petition for Rehearing is based on the following grounds:

1. Certiorari should be granted as to the sole remaining count so that the Court of Appeals may pass upon the issues left undecided by this Court's reversal of its judgment on Count IV.

2. The judgment on Count III cannot stand if there is to be uniformity in the application of principles announced by the Supreme Court in "net worth" cases.

3. Important questions in the administration of federal criminal justice presented in this case still remain undecided with conflicts of opinion among the Courts of Appeals and District Courts.

BASIC FACTS

Petitioner was indicted in a five-count indictment charging attempt to evade and defeat payment of income taxes by filing false and fraudulent returns for the years 1951-1955, inclusive. The prosecution was based on the net-worth method of proof, with the Government claiming that specific items of omitted income would be shown solely for the purpose of proving "Wilfulness."

The defense contended that the Government's net worth computation was inaccurate, due primarily to the fact that the revenue agents had omitted some thirty-six thousand dollars in additional assets owned by Petitioner at the starting point,—December 31, 1950.

The defense denied any intentional omission of "specific items" claiming that if *any* item was omitted, it was unintentional and due to negligence, poor bookkeeping system, pressure of work, ill health and emotional upsets due to diabetes, high blood pressure, violent headaches and personal problems, resulting in memory lapses, blackouts, periods of forgetfulness and fainting spells. (R. 672-674)

The defense established and proved that leads pertaining to all such additional assets as claimed had been furnished to the government by Petitioner, and that no effort had been made by the revenue agents to track down such leads, which, if established, would have established Petitioner's innocence. (R. 241, 242, 267, 324-325, 328-330, 332, 334-338, 340-345, 354-355, 372-376, 400-401, 692, 723-724).

After Petitioner's motion for judgment of acquittal at the close of the Government's case had been over-ruled, the defense offered uncontraverted evidence to establish the existence of the additional assets at the opening or base year. The testimony of the witnesses was supported by documentary records and exhibits corroborating the existence of the additional assets claimed as of the starting point. (R. 831-870).

The prosecution was unable to negate this evidence, and the jury was sufficiently convinced by this evidence and acquitted Petitioner of the felony charged for the years 1951, 1952, 1954 and 1955.

Inconsistently, the jury brought in a verdict of guilty on Count III, for 1953, the *middle* year of the five year period involved. They also found him guilty of "failing to supply information required by law" on Count IV, the count on which the Government has confessed error, and for which this Court granted Certiorari and reversed the conviction.

The basic dispute between the parties is whether a conviction, for the middle year of a five count indictment prosecuted under the net-worth method,—based as it is with each year depending on the net worth established at the end of the preceding year, and in turn on the opening net worth figure,—can stand under the circumstances of this case.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED AS TO THE SOLE REMAINING COUNT SO THAT THE COURT OF APPEALS MAY PASS ON THE ISSUES LEFT UNDECIDED BY THIS COURT'S REVERSAL OF ITS JUDGMENT ON COUNT IV

Many important questions pertaining to the criminal enforcement of the Internal Revenue Laws were left undecided by the Court of Appeals, which, in its opinion discussed only one of the many substantial errors assigned, namely, whether the requested instruction on the lesser-included offense was properly refused.

That Court held that it was. (288 F. 2d 133).

But what they did not discuss or answer were the following:

1. Whether the Government had established the opening net worth with such reasonable certainty as to warrant submission of the case to the jury;

2. Did the trial court err in ignoring the misconduct of its deputy marshal, who made prejudicial remarks to the jurors and by failing to investigate such misconduct, which was discovered and reported to the trial judge after verdict.

3. Whether the submission of the case to the jury was justified when the undisputed evidence disclosed that the revenue agents failed to track down leads furnished by the petitioner, which, if established, would prove his innocence.

4. Whether the conviction for the middle year in a five year income tax evasion case based on the "net worth" method of proof can stand where defendant has been acquitted for all the other years and when no unwarranted increase in net worth for the third year was proven by the prosecution.

5. Whether the offense of "wilfully failing to supply information" (sec. 145(a), now sec. 7203) was an offense "necessarily included" in the felony of wilfully attempting to evade an income tax by filing a false and fraudulent return. (sec. 145(b), now sec. 7201) of the Internal Revenue Code.

The Court of Appeals stated that it did not reach this question. (Page 6a Petition for Writ of Certiorari) and 288 F. 2d at 136, subhead [4].

6. Did the defendant receive a fair trial by an impartial jury as required by the Sixth Amendment when the trial court permitted, over defendant's objection, *ten* Government employees to sit on the jury, defendant having exhausted all peremptory challenges? In other words, did defendant receive a fair trial where *ten* of the *twelve* jurors were employees of the prosecution presumably biased because they receive their compensation from revenues collected by the Federal Government. (This situation is not in the same category as the ordinary criminal case where there is no reason why a Government employee should be excluded because of his employment).

7. Whether defendant was denied "due process" when the trial judge gave a secret, misleading, confusing and erroneous instruction to the jury in the absence of the defendant without his knowledge, consent or waiver in violation of Rule 43, F.R. Cr. P. and the Vth Amendent.

8. Did the trial judge err in failing to give fundamental instructions on vital issues in the case; i.e.: to acquit if the Government failed to prove a net worth case; that they could not convict on proof of omitted specific items only in the absence of proof of an unwarranted increase in net worth.

preme Court granted certiorari at the request of the Government and reversed the Court of Appeals, thus re-instating the conviction, with Mr. Justice Douglas dissenting. In *Calderon*, as in *Smith* v. *U.S.*, 348 U.S. 147, the question presented concerned the corroboration of defendant's extra-judicial admissions as to his "opening net worth".

In the *Calderon* case, defendant had stipulated all assets as listed on the government's net worth computation at the starting point, with the exception of the item of "cash on hand". He had stated that he had $500. cash in his pocket and the government listed this as cash on hand at the starting point. He also joined with the agents in working up their net worth computation and showed it to his accountant, after which he signed it. At the trial, however, defendant claimed that he had additional cash on hand in his safe, which was not included. The evidence pro and con created a factual issue which the jury resolved against Calderon. Also, the financial history of Calderon and his business during the prosecution years provided sufficient independent evidence of the crime of tax evasion to corroborate his statements concerning cash on hand. But even if Calderon's testimony of $16,000. or $17,000. additional cash on hand were accepted, by his own testimony there was still a deficiency in reported income of more than $30,000. for the prosecution period.

In *Smith* v. *U.S.*, 348 U.S. 147, Smith was indicted on five counts for the years 1946 through 1950. He was convicted on the first four counts and acquitted on the fifth count, on motion. The evidence tended to show that defendant and wife were of moderate means prior to 1945. In the four succeeding years, they acquired a large amount of visible wealth in bank accounts, real estate, securities, and other assets, and had understated their income for the four-year period by over $190,000. Smith delivered to the agents a five-page document which included tables on his securities, prior tax returns, living expenses, and a list of assets for each year from 1945 through 1949 showing changes in his

net worth over the prosecution period. These were all signed by him, and certified as "my true net worth". This statement was accompanied by a check from Smith covering the amount of tax he thought he owed.

Smith objected to admission of his net-worth statement, claiming the agent had tricked him by promising him that the case would be closed out on that basis. The agent denied any such agreement or promise to close the case. The motion to suppress was denied, and the admissibility thereof submitted to the jury under proper instructions. The question presented in *Smith* was whether there was sufficient independent evidence to corroborate his extrajudicial admission that he did not have sufficient assets at the starting point TO ACCOUNT FOR THE INCREASES IN NET WORTH ATTRIBUTED TO HIM IN THE PROSECUTION YEARS. (Emphasis supplied). The Court held that corroboration of alleged admissions was required, "where, as in this case, the admission is made after the fact to an official charged with investigating the possibility of wrongdoing, and the statement embraces an element VITAL to the Government's case.

Mr. Justice Clark, again speaking for a unanimous Court, said (348 U.S. at 155):

> "WITHOUT PROOF THAT ASSETS ON HAND AT THE BEGINNING OF THE PROSECUTION PERIOD DID NOT ACCOUNT FOR THE ALLEGED NET WORTH INCREASES, THE GOVERNMENT COULD NOT SUCCEED." (Citing *Holland* v. *U. S.*, 348 U.S. 121) (Emphasis supplied)

NO SUCH PROOF WAS PRODUCED IN THE *Chaifetz* CASE.

Affirming the conviction in *Smith*, the Supreme Court said that the trial judge and the reviewing courts had a duty of "careful scrutiny".

With these considerations and principles announced by the Supreme Court in the so-called "net-worth" cases, we turn to the facts in the *Chaifetz* case.

In the instant case, the evidence adduced by the Government is INSUFFICIENT TO SUSTAIN A CONVICTION ON COUNT III. This assignment of error seems to have become lost in the great mass of papers constituting the Record, and due to the complexity of the case, the Court of Appeals did not discuss or even mention this point, and this contention remains unanswered even now.

It would be a gross miscarriage of justice to permit petitioner, a reputable attorney and member of this Bar, to remain ensnared in one count out of a five-count indictment, because of the dangers to an accused in the net worth method.

The five-count indictment here covered the period from January 1, 1951 through December 31, 1955. The net worth computation made by the Government Agents was predicated upon the "opening net worth" figure, which they used as a starting point to calculate future increases at the end of each year involved.

Obviously, if the agents have omitted from their computation substantial assets owned by petitioner at the starting point, sufficient to account for the alleged increase in net worth, all subsequent calculations are inaccurate and erroneous to that extent; or, putting it as Mr. Justice Clark said it in *Smith v. U.S.*, 348 U.S. 147, at 155:

> "Without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increases, the Government could not succeed".

The Government's proof in this case consisted of evidence to establish "opening assets" which were not stipulated; and several items of omitted income, referred to as "specific items" which were offered for the sole purpose of showing "wilfulness". The evidence showed that all but $313.30 was entered, deposited, and identified in petitioner's check book stub records for the year 1953.

This relationship between the alleged increases in net worth and "specific items" must constantly be kept in mind, as this goes to the heart of the question of sufficiency of the evidence for 1953 (Count III).

Construing the evidence most favorably to the Government, its net worth computation (R. 884-Govt. Ex. No. 66) showed that petitioner had a net worth on December 31, 1953 of $94,114.20 and an opening net worth on December 31, 1950, of $61,018.52. The Government contended, based on these figures, that petitioner's net worth had increased $33,095.68 by the end of 1953. Everything depends on the accuracy of the Government's "opening net worth figure".

The prosecution proved, and defendant admitted, that he owned all the assets listed in the government's "opening net worth". But the defendant previously furnished the Government during the investigation, with leads to additional assets of $35,172.50 owned as of the starting point, which were omitted from the government's starting net worth, and which would more than account for the apparent net worth increase at the end of the 3 year period to December 31, 1953, and at the trial established the existence of these additional assets as of December 31, 1950 (See R. 850-Def's Ex. No. 45), both by documentary evidence and exhibits (R. 831 to 870) and by testimony of persons who either were indebted to petitioner at that time or had other personal knowledge of the facts. None of this evidence was contradicted by the prosecution, nor was it able to shake the defense witnesses on cross examination. Cross examination of the Revenue agents revealed that they had completely ignored the leads furnished to the Government, and failed to track them down as required by the rules laid down in the Holland case. (R. 241-242; 267; 324-325; 328-330; 332; 334-338; 340-345; 347-349; 354-355; 372-376; 400-401; 692; 723-724).

There was no evidence in this case of a financial history going back for years, as in the "net-worth cases" to show

that petitioner was ever "broke" or without ample funds. There were no judgments against petitioner. His home was bought and paid for in full in the early 1940's. In fact, petitioner established by the expert testimony of Mr. Wayne Kendrick, CPA and formerly Chairman of the D. C. Board of Accountancy for 27 years, that he was worth more at the end of 1945, FIVE YEARS BEFORE THE STARTING POINT than the government showed as its opening at the end of 1950.

Except for the item of cash on hand, the CPA was able to *certify* each asset as being owned by petitioner at end of 1945. (Def. Ex. No. 53-R. 864-868)

This total failure to prove its "opening net worth" figure resulted in an acquittal by the jury of the felony charged for 1951, 1952, 1954 and 1955. For 1953, the jury was instructed that it could return only TWO possible verdicts: guilty of the felony or "not guilty". The jury brought in a verdict of "Guilty" for 1953, Count III.

As has been shown, the prosecution completely failed to carry its burden of showing that there was ANY net worth increase through 1953, and the jury resolved this issue in favor of the defendant, by its acquittal for 1951 and 1952. Any increase for 1953 had to be based on the ORIGINAL STARTING NET WORTH. Since all reasonable men would have to agree that the Government failed to prove that defendant did not have the additional assets at the starting point, and this would explain the apparent net worth increase at least through 1953, the trial court should have granted the motion for judgment of acquittal and should not even have submitted the first three Counts to the jury on that basis, as well as the failure to run down leads.

After verdict, when defendant renewed his motion for judgment of acquittal, the trial court was in a better position to scrutinize the evidence insofar as it related to the

conviction on Count III, for 1953, the only felony count remaining.

We contend that the error in submitting the case to the jury for 1953 was compounded when the trial court failed to grant the motion for judgment of acquittal N.O.V.

The District Court did not heed the salutary rules announced by the Supreme Court in the net-worth cases, supra, for the guidance of the prosecution, the defense and the trial court.

It refused to grant defendant's motion for judgment of acquittal when the undisputed evidence disclosed the failure of the Government agents to track down relevant leads furnished by the defendant as to additional assets owned at the starting point.

It failed to give a charge that was "especially clear" and failed to state the inferences available for the accused; failed to show the relationship between the alleged net worth increases and the specific items; failed to limit the specific items to show "wilfulness", as he had previously ruled; (R. 296) and committed other errors of omission and commission as shown in detail in the Petition for Writ of Certiorari.

The Court of Appeals did not review the case as charged by this Court, "bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation". That Court ignored the complete insufficiency of the evidence to sustain a conviction on Count III by the net worth method, and embarked on a seven-page discussion of the "lesser included offense" assignment of error, and even decided that question erroneously and in conflict with a case in its own Court cited as authority for its decision, when that case, as will be shown, is authority for *Petitioner's* contention.

The Government's failure to investigate the relevant leads furnished by petitioner or to negate his explanations, coupled with affirmative proof by the defense, not negated, as to the correct opening net worth etc., required the trial court to "consider them as true and the Government's case insufficient to go to the jury". In addition, the Government failed to prove any tax deficiency for 1953, except the computation of the agent, based on his own computations of increases in net worth, based on his erroneous assumptions and conclusions as to the "opening net worth". This is one of the dangers when courts permit a series of theoretical estimates and computations as to a taxpayer's income to take the place of proof. IT SUBSTITUTES INFERENCE FOR PROOF. ["The 'Net Worth' Decisions: Proof of Tax Evasion by Inference" by Harry Graham Balter—ABA Journal, June 1955.]

The uncontradicted evidence showed that the tax return for 1953 was made on January 19, 1954. Uncontroverted medical testimony showed that in 1953 petitioner developed diabetes and that from 1953 to 1954 the diabetes was uncontrolled with attendant symptoms; that he suffered from severe migrain headaches, high blood pressure, lapses of memory and black-out spells caused by the diabetes. Other testimony showed that defendant's father, Louis Chaifetz, died on December 30, 1953, was buried on December 31, 1953, and when petitioner returned from the funeral, he contracted pneumonia and was ill and disabled, and drew disability benefits from January 1, 1954 through March 15, 1954—all of which negated any willful attempt to defraud by filing the return prepared during this period. (R. 672-674)

The prosecution described the case at all times and during the trial, as a "net-worth case" (R. 293, 296) and it was tried on that basis. The Court, in instructing the jury said:

> "The Government, in this case, relies upon the net-worth-plus expenditures method of proof to substan-

tiate its contention that the defendant wilfully attempted to evade payment of income taxes. *To Corroborate* its claim that the defendant was *wilful* in attempting to evade payment of income taxes, the Government has submitted evidence of alleged specific items. On the other hand, defendant denies that he wilfully omitted any specific items of income for any of the years in issue and asserts that what omitted items there were were omitted by reason of mistake or inadvertence". (R. 763)

Thus, the specific items alone could not be the basis of a conviction for 1953 (or any year), since this was NOT a "specific item" case, with the specific items to be used solely to show wilfulness (R. 293, 296-297, 303), PROVIDED the prosecution was First able to prove or the jury would FIRST find an increase in net worth for 1953 (or any year), since specific items do not enter into the computation in a net worth case.

Although the trial court had ruled that the prosecution had *precluded itself* from finding defendant guilty on a "specific item" basis (R. 296-297), the trial court FAILED to give this vital instruction to the jury, and did NOT tell them that they could not find petitioner guilty for 1953 (or any other year) based on specific items alone and that before they could consider the specific items on the question of intent or wilfulness, they first had to find beyond a reasonable doubt that there was an unwarranted increase in net worth for 1953 (or any year).

Instead, the charge, as given, invited a conviction based on specific items alone. (R. 756-758.) By instructing in this manner, omitting inferences favorable to defendant, the jury was told they could find petitioner guilty on specific items alone, since they could infer that if any specific item was not reported, an additional tax, of necessity, was due thereon.

If we examine the prosecutor's argument, hammering and pounding over and over at the specific items omitted

in 1953 (R. 741-742) there is no other explanation for the conviction for 1953. The jury was told, erroneously, that conviction would be warranted if they found that defendant did not *fully and correctly* report his income and the tax due thereon for any year that the returns were filed in a wilful and intentional attempt to evade payment of income tax. (R. 758-759). This type of instruction too, coupled with failure to instruct that conviction could not be based on specific items alone, invited conviction on a specific item basis.

Petitioner asks this Supreme Court merely to read the entire charge as given by the trial court (R. 747-778) and the conclusion is inescapable that this was not a fair charge to the petitioner or a charge required in a net worth case as outlined by this Court.

Petitioner asks only that he be given equal justice and the equal protection of the law.

This Court has not spoken on this subject since 1954 and has consistently denied certiorari in "net worth" cases. But this case cries out for the Supreme Court to exercise its supervisory power to afford petitioner the safeguards announced in the Holland case as a protection against overzealous prosecution of tax evasion cases by the net worth method, where inferences are substituted for proof.

III.

IMPORTANT QUESTIONS IN THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE PRESENTED BY THIS CASE STILL REMAIN UNDECIDED, WITH CONFLICTS OF OPINION AMONG THE COURTS OF APPEALS AND DISTRICT COURTS

This Court has always granted certiorari whenever serious questions in the administration of federal criminal justice have been presented. *McNabb* v. *U. S.*, 318 U.S. 332, 63 S. Ct. 608; *Braverman* v. *U. S.*, 317 U.S. 49, 63 S. Ct. 99; *U. S.* v. *Johnson*, 319 U.S. 503, 63 S. Ct. 1233; *Spies* v. *U. S.*, 317 U.S. 492, 63 S. Ct. 364, 87 L. ed. ——:

Holland v. *U. S.*, 348 U.S. 121, 75 S. Ct. 127, 99 L. ed. 150; and this Court has not hestiated to correct its own prior judgments and has exercised this power even after timely petitions for rehearing were denied, by vacating the previous orders, granting the petition for rehearing, and reversing the judgment. *U. S.* v. *Ohio Power Co.*, 353 U.S. 98; 77 S. Ct. 652; *Cahill* v. *N.Y., N.H. & H.R. Co.*, 351 U.S. 183; 76 S. Ct. 758; 100 L. ed. 1075; *Achilli* v. *U. S.*, 352 U.S. 1023; 77 S. Ct. 588; 353 U.S. 374; 77 S. Ct. 995; *Remmer* v. *U. S.*, 347 U.S. 227, 74 St. Ct. 450; 98 L. ed. 654; 348 U.S. 904; 75 S. Ct. 288; 99 L. ed. 654; 350 U.S. 377; 76 S. Ct. 425; 350 U.S. 820, 76 S. Ct. 63.

The *Remmer case* is apropos to one of the important questions presented in the instant case and likewise was a tax evasion case. During the trial, one of the jurors was approached by an outsider and told he could make some easy money if he made a deal with Remmer. The juror reported this to the judge, who in turn reported it to the prosecutor, who with the judge's approval called in the F.B.I.—all of which was unknown to Remmer until he read about it in the newspaper AFTER the jury had returned its verdict of guilty.

Three times this Court granted certiorari because of this one incident. The first time the case was remanded to the District Court to hold a hearing to determine whether the incident was prejudicial to Remmer. The District Court held a hearing and found no prejudice to him. Thereafter the Supreme Court remanded the entire record to the 9th Circuit to consider the whole case in the light of the then recent net worth decisions. The 9th Circuit reviewed the whole record and affirmed Remmer's conviction. The case was brought to this Court on certiorari a third time, limited to the question of the effect of the extraneous communications with the juror upon Remmer's right to a fair trial.

The Supreme Court, which had previously held that ANY contact or private communication with a juror is presumptively prejudicial, HELD that the evidence established that the incident had affected the juror's freedom of action as a juror and VACATED the judgment of conviction and remanded with directions to grant a new trial. The Supreme Court said:

> "Both equal protection and due process emphasize the central aim of the judicial system that all people charged with crime must stand on an equality before the bar of justice". (citing Griffin v. State of Illinois, 351 U.S. 12, 76 S. Ct. 585; 100 L. ed.——.

In the instant case, AFTER the jury had returned its verdict, an alternate juror telephoned petitioner's former counsel and reported several prejudicial remarks made by the deputy marshal to the jurors during the trial. When petitioner learned of this, he compelled former defense counsel to report the matter to the trial judge and to demand a new trial based on that incident.

What occurred appears in the Record, at pp. 811-819, and took place at a Bench Conference between former defense counsel and the trial court, out of petitioner's hearing. It appears that in addition to the prejudicial jury incidents, former defense counsel abdicated so that petitioner was deprived of effective assistance of counsel without his knowledge.

Although petitioner had ordered a transcript of this bench conference on December 16, 1959, the day it transpired, he was unable to obtain a copy thereof or learn what was said until March 16, 1960, as the Court Reporter who reported the conference, had resigned and gone to Texas.

Petitioner was not only deprived of a fair trial by an impartial jury, as required by the Constitution, but due

to an unwarranted demand for money by former defense counsel, not acceded to by petitioner, that counsel did not press the jury matter. But as this Court said in the *Remmer case*, the trial court had an independent duty to investigate the occurrence to determine whether there had been prejudice to petitioner. THIS THE TRIAL COURT FAILED TO DO. Petitioner was not consulted as to his wishes in the matter.

The Court of Appeals did not discuss or decide this important question, and petitioner prays that the "Remmer Rule" be applied in this case so that he may receive equal justice and equal protection of the law, and that there may be uniformity in the application of principles announced by the Supreme Court.

In the exercise of its supervisory powers, the Supreme Court should not let the conviction on Count III herein stand.

This Court has held that if an error in a criminal case had a substantial influence on the result, or if there is grave doubt about it, THE CONVICTION CANNOT STAND, even if it is supported by evidence. *Fiswick* v. *U. S.*, 329 U.S. 211, 67 S. Ct. 224; 91 L. ed. 196.

But many other grave errors occurred in petitioner's case. Over petitioner's objection, 10 employees of the Federal Government, who receive their compensation from the revenues collected, were permitted to sit on the jury after petitioner had exhausted his peremptory challenges, depriving petitioner of a fair trial.

Although the Supreme Court has considered a similar question previously (Cases cited in Pet. pp. 28-31) it is submitted no previously considered cases involved tax evasion, and that this Court should reconsider the question in the light of the type of violation involved; the great

number of Government employees who sit on juries in the District of Columbia; and whether a government employee is impliedly biased as a matter of law in a criminal case where his employer, the Government, is prosecuting a defendant for income tax evasion.

Were the Supreme Court to rule in favor of petitioner on this question, it would not preclude government employees from sitting on juries in other types of criminal cases where the revenue was not involved.

This question too was not discussed or decided by the Court of Appeals.

Another and perhaps the most grievous error in this case was the failure of the trial court and the reviewing court to apply the principles and rules announced by this Court in *Holland* v. *U. S.* for the guidance of lower courts in handling tax evasion cases prosecuted under the net worth method. It has already been shown that there was a complete absence of proof by the Government to establish its "opening net worth" and a complete failure to run down leads to some $36,000 in additional assets owned at the starting point, which were affirmatively proved by petitioner, and failure to give a lucid charge to the jury, with a refusal to instruct on vital points which would have resulted in an acquittal. But this primary issue was likewise not discussed nor decided by the appellate court; charged with the duty of carefully scrutinizing each case on its own facts.

Tied in with the insufficiency of the evidence to establish a "net worth" case, is the failure of the trial court to grant judgment of acquittal; particularly on the motion N.O.V., when only 1953 and the erroneous 1954 misdemeanor conviction were left for examination and consideration.

The failure to grant the motion at that point was inexcusable error.

The trial court erred in submitting the case to the jury; but, when, in submitting the case, it refused to give the "lesser included offense" instruction as requested by petitioner for 1953 as well as 1954 and 1955, as provided by Rule 31(c), F.R.Cr.P.; failed to instruct the jury to acquit if the additional assets owned by defendant at the starting point account for the alleged increase in net worth; failed to tell the jury that guilt had to be determined on a "net worth" basis only, since this was strictly a net-worth case, and that it could not convict based on omission of unreported specific items if no unwarranted increase in net worth was established beyond a reasoanble doubt by the Government; gave erroneous instructions permitting a conviction on a specific item basis as shown hereinabove; failed to point out inferences FAVORABLE to the petitioner, such as the fact that there was no proof indicating that ANY tax was due for 1953 or any other year, except the computation of the Revenue Agent based on his assumption that his opening net worth was correct; that if it was not correct, there was no proof of any tax deficiency; —when the trial court did and failed to do all these things, this was the fatal error, which compounding all the other errors, resulted in an unjust conviction for 1953.

But the appellate court did not see fit to discuss any of these instructions or lack of instructions or decide the contentions based thereon.

Still another reversible error was committed when the trial court violated Rule 43, F.R.Cr.P. and denied petitioner "due process" under the Fifth Amendment to the Constitution, when he gave an erroneous and secret instruction to the jury in the absence of the petitioner, without the latter's knowledge, consent or waiver.

After the jury retired to deliberate, it sent a note (R. 797) to the trial judge requesting a certain exhibit described as the "Philadelphia Conference Letter" (Def's Exh. No. 60 for ident.).

The Judge did not re-open the Court and call in either the Jury, the defendant or counsel for either side, for the purpose of giving the instruction to the Jury in the PRESENCE of defendant.

Instead the trial judge wrote the following on a slip of paper and sent the paper to the jury (R. 797):

> "November 24, 1959. Received message 1:30 P.M.: after consultation with *counsel*, jury was informed that *no such exhibit existed*.
>
> /s/ Luther W. Youngdahl"

Later the jury brought in a verdict of guilty for 1953.

Defendant and his counsel did not know of the Jury's request for the instruction or the action by the Court until AFTER the verdict, and the discharge of the Jury. This was discovered later when defendant and present counsel found the note in the case file. Not only does Rule 43, F.R.Cr.P. require that the defendant be present at "every stage of the trial", but that rule continued existing law. *Lewis* v. *U.S.*, 146 U.S. 370; *Diaz* v. *U.S.*, 223 U.S. 442, 445; Notes of Advisory Comm. on Rule 43.

In *Shields* v. *U.S.*, 273 U.S. 583, 47 S.Ct. 478, the Supreme Court held:

> "Joint request by counsel for defendant and prosecutor to hold jury until agreeing on verdict, made in judge's chambers without presence of defendant, cannot be extended beyond its exact terms, AND DID NOT INCLUDE AGREEMENT FOR COURT TO RECEIVE COMMUNICATION FROM JURY AND ANSWER IT IN DEFENDANT'S ABSENCE. . . ."

In *McClanahan* v. *U.S.*, 272 F. 2d 663 (1959), the Fifth Circuit REVERSED a conviction for tax evasion solely on this ground without reaching other errors assigned. This result is in line with the decisions of the Supreme Court and other Federal Courts. *Parfet* v. *Kansas City Life Ins.*

Co. (C.A. 10), 128 F. 2d 361; *Fillippon* v. *Albion Slate Co.*, 250 U.S. 76, and cases cited therein.

But this important and serious question which can arise in any federal criminal case was not discussed or decided by the reviewing court below, and by its affirmance, brought it in conflict with decisions of this Court and the Fifth and Tenth Circuits, supra.

Such apparent error should not be condoned by the Supreme Court.

Last but not least is the matter of Rule 31(c), F.R.Cr.P., the "lesser included offense", and whether any of the misdemeanors enumerated in Section 145(a) (now Section 7203 I.R.C.) is a "lesser included offense" contained in Section 145(b) (now Section 7201 I.R.C.).

Specifically, is the misdemeanor of "willfully failing to supply information" included in the felony of attempting to evade payment of income tax by filing a false and fraudulent return?

This is a very important federal question which constantly arises in enforcement of the criminal sanctions of the Internal Revenue Code. It is a question concerning which there is conflict in the lower Federal Courts and it does not appear to have been decided by the Supreme Court, except perhaps by implication, in *Spies* v. *U.S.*, 317 U.S. 492; 63 S.Ct. 364; 87 L.ed. —, where Mr. Justice Jackson, delivering the unanimous opinion of the Court, REVERSED a conviction under Section 145(b) because the trial court refused to give an instruction that an inference of a willful attempt to defeat or evade tax must come from some proof in the case OTHER than that necessary to make out the misdemeanors enumerated in Section 145(a). In *Spies*, we find the following statements by the Supreme Court:

> "WILLFUL BUT PASSIVE NEGLECT of the statutory duty may constitute the lesser offense . . ."

> "A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it CLEAR THAT THIS FELONY (145-b) MAY INCLUDE ONE OR SEVERAL OF THE OTHER OFFENSES AGAINST THE REVENUE LAWS."

The specific misdemeanor of failing to supply information was not discussed in the *Spies* case. The only case petitioner has been able to find SQUARELY IN POINT is the case of *U.S.* v. *McCue*, 160 F. Supp. 595 (D.C. Conn. 1958) where Judge Anderson analyzed the offense of "willful failure to supply information" leaving no room to doubt that "it is necessarily included in the felony of attempting to evade tax by filing a false and fraudulent return, since it is impossible to file a false and fraudulent return without failing to supply information."

The Trial Judge below followed *McCue* and gave the instruction for 1954 and 1955 but refused to give it for 1953 (Count III), and the earlier years, stating that he did so because they were barred by limitations. The Court of Appeals below, in the only point discussed and decided, held it was not error to refuse to give the instruction but did not reach the question whether it was a lesser included offense. In making that decision, the appellate court relied on its own decision in *Askins* v. *U.S.*, 102 U.S. App. D.C. 198, 251 F. 2d 909, stating that its holding in *Chaifetz* was in accordance with the holding there.

THAT IS NOT SO.

THE ASKINS CASE IS DIRECTLY CONTRARY TO THEIR HOLDING IN THIS CASE AND SUPPORTS PETITIONER'S CONTENTION.

The Court of Appeals misconceived the issue, which is not whether Chaifetz could be CONVICTED OR PUNISHED for a 1953 misdemeanor which was barred by limitations, but whether the jury should have been instructed

on the lesser included offense so that they jury could determine the grade or degree of crime, if any, which petitioner had committed for the year 1953.

The question presented on the lesser included offense is:

Should the instruction on the lesser included offense be given where *punishment* is barred by limitations?

In *Askins*, defendant was indicted for first degree murder and was convicted of murder in the second degree, a lesser offense, which was barred by limitations. Defendant failed to object to sentence, and did not raise the question on appeal and his conviction was affirmed. (97 U.S. App. D.C. 407; 231 F. 2d 741, cert. den. 351 U.S. 989).

Later Askins brought a proceeding under 28 U.S.C.A. 2255 and attacked the sentence and conviction for the first time. The Court below reversed the conviction and speaking through J. Fahy said:

> "A sentence imposed for second degree murder on an indictment for first degree murder, but found more than three years after the offense, is a sentence—not authorized by law—. Appellant could not have objected to being tried on the indictment since it was for first degree murder, as to which there is no time limitation. When, however, the verdict of guilty of second degree murder was rendered, he could have objected to being sentenced, and indeed, he could have requested that ONLY the issue of first degree murder be submitted to the jury. *But he lost no right by not doing the latter.* He was not required to ask for a verdict of either first degree murder or not guilty; *HE COULD SEEK A VERDICT OF EITHER SECOND DEGREE MURDER* OR OF NOT GUILTY, and his failure to object to being sentenced did not relieve the court of its own obligation to impose no sentence not authorized by the law applicable to the verdict which was rendered—". **"The question of sentence—punishment—was one for the court".** (Emphasis supplied)

Judge Prettyman, who wrote the opinion in petitioner's case, was a member of the panel which decided the *Askins* case in 1958, and when he wrote in Chaifetz:

> "We had this problem in Askins v. United States, and our present holding is in accord with that one"

he was mistaken.

As has been shown, the present holding of the Court of Appeals is *CONTRARY* to the holding in Askins. But the holding below on this point is also CONTRARY to the decision of the Supreme Court in *Stevenson* v. *U.S.*, 162 U.S. 313, 16 S. Ct. 839; 40 L. ed. 980. There defendant was charged with murder and pleaded "self-defense". The trial court there ruled the crime was either murder or done in self defense and that under no view of the evidence could the jury find defendant guilty of manslaughter, and refused to instruct on the lesser included offense.

The Supreme Court reversed the conviction of murder and remanded the cause for a new trial. Upon review, it held that there was evidence which tended to bring the crime within the grade of manslaughter, and that it was then a proper question for the JURY whether the crime was manslaughter instead of murder—and it was error to refuse an instruction on this subject. The Supreme Court said:

> **"The evidence as to the lesser included offense need not be uncontradicted or in any way conclusive on the question. So long as there is some evidence, the proper weight to be given it is for the jury to determine."**
> **"We only decide that the question as to the grade of the crime,** whether murder or manslaughter, **should have been submitted to the jury** as well as the question of self-defense". (Emphasis supplied)

Petitioner makes the same contention: that the question as to the grade of the crime, if any, committed in 1953, whether the felony of income tax evasion, or the misdemeanor of

"willfully failing to supply information required by law", should have been submitted to the jury. At the very least the jury should have been told to acquit if only the "Lesser Offense" was committed for 1953. The jury attempted to find petitioner guilty of this misdemeanor for 1954 (Count IV) but were precluded from doing so for 1953 (Count III), because the trial court restricted them to a verdict of either guilty of felony or not guilty.

It is no answer, as the trial judge said, 181 F. Supp. 57, (R. 822)

> "But if the jury believed the defendant 'only committed a misdemeanor' it would have found the defendant not guilty of the felony charge for 1953. This it did not do."

In the *Stevenson* case, 162 U.S. 313, the jury found defendant guilty of murder. It was held error not to instruct on the lesser offense of manslaughter. To say, as Judge Youngdahl said, that if the jury believed the defendant only committed manslaughter, it would have found him not guilty of murder, only begs the question.

The Jury did find Stevenson guilty of murder. THE ERROR LIES IN FAILING TO GIVE THE PROPER INSTRUCTION, TO GIVE THE JURY THE OPPORTUNITY TO DECIDE THE FACTUAL ISSUE AS TO THE GRADE OR DEGREE OF CRIME WHICH MAY HAVE BEEN COMMITTED.

It is fundamental law that a statute of limitations is not pleaded in advance and the question ought only be raised when evidence of a lesser offense barred by the statute is allowed for the purpose of sentencing for the misdemeanor or lesser offense.

In the instant case, the lower courts either chose to ignore or refused to consider the important question raised by Petitioner who insists that it is good law to instruct a

jury on all points of the law involved if the evidence produced at the trial warrants an instruction on the lesser-included offense since a conviction or acquittal for the offense alleged in an indictment is a bar to prosecution for a lesser offense upon which the defendant could have been convicted as a part or incident of the crime charged, *Ex Parte Nielsen*, (1889), 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118, the court must consider whether the evidence justifies a verdict of guilty not only as to the crime charged, but also as to lesser offenses that may be included in the crime. *U. S.* v. *Kelly*, 119 F. Supp. 217. U.S.D.C.D.C. (Laws, C. J.)

All of the foregoing cases hold that a defendant is entitled to a lesser offense charge as a matter of right.

Since the only question decided by the Court of Appeals was decided erroneously and in conflict with its own decision and that of the Supreme Court, this error should not pass unnoticed to the detriment of petitioner, but the Supreme Court should grant this petition for rehearing, grant certiorari and reverse the conviction on Count III.

Finally, petitioner, seriously questions whether he was truly afforded a trial by jury—when part of its function—to determine what the defendant was guilty of, based on the facts presented—was taken away and decided in advance for them by the court.

CONCLUSION

Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence, which are not satisfied by mere observance of minimal historic safeguards.

The principles announced by this Court in the "net-worth" cases were designed not only to secure convictions of the guilty but also to safeguard and protect the innocent. A conviction resting on such a flagrant disregard of the rules announced by this Court cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law.

Simple fairness and the democratic principles upon which this country is founded demand and require that the petitioner be afforded the equal protection of the law, equal justice under law and due process of law. Simply stated, this means that his net worth case be tried under the same rules laid down in the Holland case; that the jury incident in his case be considered in the light of the Remmer case, and that in view of all the other foregoing prejudicial and reversible errors, the conviction ought to be reversed.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the Order denying the petition for writ of certiorari as to Count III be vacated and that certiorari be granted as prayed in the Petition and the conviction on Count III be also reversed.

Respectfully submitted,

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Certificate of Counsel

The undersigned, I. William Stempil, attorney for petitioner herein, hereby certifies that the Petition for Rehearing herein is presented in good faith and not for delay, and that in his judgment said petition is restricted to grounds permitted by Rule 58 of this Court.

I. WILLIAM STEMPIL
Attorney for Petitioner

Dated: May 24th, 1961.